

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

**DEFENDANTS**

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |                                         | PTF                        | DEF                        |                                                                      | PTF                        | DEF                        |
|-----------------------------------------|----------------------------|----------------------------|----------------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated <i>or</i> Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated <i>and</i> Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation                                                       | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights <b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

**V. ORIGIN**

(Place an "X" in One Box Only)

- ☐ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

GEEP TEXAS LLC and  
TECHWAY SERVICES, INC.,

Plaintiffs

V.

DARIK HORN,

Defendant

Case No. \_\_\_\_\_

JURY

## **NOTICE OF REMOVAL**

TO ALL PARTIES, THEIR ATTORNEYS OF RECORD, AND TO THE  
HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION:

COMES NOW DEFENDANT DARIK HORN (“Horn”) and hereby gives notice of the removal of the above-captioned civil action from the District Court of Denton County, Texas, 367th Judicial District, to the United States District Court for the Eastern District of Texas, Sherman Division.

1. Horn is a Defendant in the above-captioned civil action, which was originally filed in the District Court of Denton County, Texas, 367th Judicial District, on December 15, 2009, styled as GEEP TEXAS LLC and TECHWAY SERVICES, INC., Plaintiffs v. DARIK HORN, Defendant, under Cause No. 2009-50404-367. (Exhibit 1., Verified Petition.)

2. This Court has original jurisdiction of this action under the provisions of 28 U.S.C. §§ 1331 and 1338 in that at the time of the filing of the Original Petition, and up to the present, federal question jurisdiction exists as Plaintiffs have brought claims and sought a

declaratory judgment relating to rights arising under the Copyright Act, 17 U.S.C. § 101 *et seq.*, the jurisdiction of which is exclusively federal.

3. Plaintiff's declaratory judgment claim "arises under" federal law as "it appears that some substantial, disputed question of federal law is a necessary element of one of [plaintiff's] well-pleaded state claims...." *See Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 291 (E.D. Tex. 1988) (*citing Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-13, 103 S. Ct. 2841, 2846-48, 77 L. Ed. 2d 420 (1983)). Plaintiffs seek a declaration that "Plaintiffs have an exclusive worldwide right... to use, execute, reproduce and/or distribute copies of the Techway Version (EBAN®) developed by Horn, including the derivative works of the Techway Version and any DBAN modifications incorporated as part of the Techway Version." (Ex. 1, Verified Petition. ¶ 75.) These allegations reference several specific rights granted under federal copyright laws to the owner of a copyrighted work over which federal courts have exclusive jurisdiction. *See* 17 U.S.C. § 106; 28 U.S.C. § 1338. Additionally, Plaintiffs assert facts relating to Horn's status as both an independent contractor and an employee at different points in time during their transactions. (Ex. 1, Verified Petition. ¶ 20.) Thus, Plaintiffs have set forth facts relating to ownership of the copyright(s) and have requested the Court to declare it possesses ownership of rights granted by copyright laws. Plaintiffs admit that such a declaration would "resolve all or a complete part of the controversy between the parties." (Ex. 1, Verified Petition. ¶ 76.) As such, a substantial, disputed question of federal law is a substantial, disputed element in Plaintiffs' "well-pleaded complaint" and Plaintiff's claim "arises under" federal law. Therefore, federal jurisdiction exists and the action is properly removable.

4. Federal jurisdiction exists under the Declaratory Judgment Act if the declaratory judgment defendant could file a coercive action based in part on federal law. *Halliburton Co. Benefits Comm. v. Mem'l Hermann Hosp. Sys.*, 2006 U.S. Dist. LEXIS 3184 (S.D. Tex. Jan. 19, 2006). As established above in paragraph 3, the issue of ownership of the copyrights for the EBAN software is at issue. It follows that Horn could file a coercive action based on the

Copyright Act for copyright infringement of the EBAN software. Thus, federal jurisdiction exists under the Declaratory Judgment Act and the action is properly removable.

5. Furthermore, Plaintiffs' declaratory judgment claim for a declaration that it has "an exclusive worldwide right and license to use, execute, reproduce and/or distribute copies of the Techway Version (EBAN®) developed by Horn, including the derivative works of the Techway Version and any DBAN modifications incorporated as part of the Techway Version" (Ex. 1, Verified Petition. ¶ 75) is pre-empted by federal law. A state cause of action is pre-empted by 17 U.S.C. § 301 if the rights at issue come within the subject matter of copyright as set forth in §§ 102 and 103, and the rights at issue are equivalent to the exclusive rights of § 106. *Gemcraft Homes*, 688 F. Supp. at 294. The express intent of Congress was to preempt all state causes of action for violations of the exclusive rights found in § 106 and coming within the subject matter of copyright as specified in 17 U.S.C. §§ 102, 103. *Id.* at 293. The Techway Version (EBAN®) of the software comes within the subject matter of copyright as set forth in §§ 102 and 103, and the rights asserted by Plaintiffs, "to use, execute, reproduce and/or distribute copies... including derivative works" is a specific reference to several rights granted under federal copyright laws to the owner of a copyrighted work. Thus, both elements of the test are satisfied and the underlying basis for Plaintiffs' claim is completely pre-empted by federal law. Consequently, federal jurisdiction exists and the action is properly removable.

6. Plaintiffs' breach of contract, misappropriation and use of trade secrets, breach of fiduciary duty/breach of duty of loyalty, unfair competition and conversion claims also will require the determination of the ownership of the copyright for the software and other confidential and proprietary information pursuant to federal copyright laws. Thus, it appears that these claims involve a substantial, disputed question of federal law and "arise under" federal law. Therefore, federal jurisdiction exists and the action is properly removable.

7. Because Plaintiffs' remaining claims form part of the same case or controversy, the Court has supplemental jurisdiction over all of Plaintiffs' claims under 28 U.S.C. § 1367(a).

8. Horn first received a copy of the Summons and Original Complaint on or about December 16, 2009 when a copy was personally delivered to him. This Notice of Removal was filed on December 17, 2009, within thirty days of receiving the Summons and Original Complaint.

9. As Horn is the only named defendant, no statements of joinder are necessary.

10. This Court has removal jurisdiction of this action under the provisions of 28 U.S.C. sections 1441(b), and 1446 (a), (b), and (d).

11. A jury demand was made in the state court action by Plaintiffs. (Ex. 1, Verified Petition. ¶ 84.)

12. Horn does not admit the propriety, sufficiency or effectiveness, in law or fact, of the purported service of the Citation and Petition. Horn expressly preserves all of these issues for future challenge.

13. A filing fee of \$350.00 has been tendered to the Clerk of the United States District Court for the Eastern District of Texas, Sherman Division, all parties of record promptly will be served with notice of this removal and such notice will be filed with the Clerk of the District Court of Denton County, Texas, 367th Judicial District. Once the notice is filed with the state court, a certification that such filing has been made will be filed with this Court.

11. Copies of all documents required to be filed pursuant to 28 U.S.C. §1446(a) and Local Rule CV-81 are attached as follows:

<b><u>Exhibit #</u></b>	<b><u>Description of Exhibit</u></b>
1	All Pleadings in State Court Action
2	Certified Copy of State Court Docket Sheet
3	Information Required by Local Rule CV-81

WHEREFORE, Horn respectfully gives notice, and respectfully prays, that the above action be removed from the District Court of Denton County, Texas, 367th Judicial District, in which it was filed, to the United States District Court for the Eastern District of Texas, Sherman

Division, and prays further that this Honorable Court issue all necessary orders and process and grant such other and further relief as in law and equity it may be entitled to receive.

Dated: December 17, 2009

Respectfully submitted,

Carstens & Cahoon, LLP

/s/ Vincent J. Allen

Vincent J. Allen

Texas State Bar No. 24012209

Celina M. Diaz

Texas State Bar No. 24044933

Amanda K. Jenkins

Texas State Bar No. 24054550

13760 Noel Road, Suite 900

Dallas, Texas 75240

Telephone: 972-367-2001

Facsimile: 972-367-2002

ATTORNEYS FOR DEFENDANT,

DARIK HORN

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document has been served on December 17, 2009 by first class U.S. mail on the following attorneys of record:

Dawn Estes Texas Bar No. 14251350 Laurie Martin Texas Bar No. 24002442 Taber Estes Thorne & Carr 3500 Maple Avenue, Suite 1340 Dallas, Texas 75219 Telephone: (214) 526-2107 Telecopier: (214) 526-2128	Matthew K. Davis Texas Bar No. 05526000 Alexander M. Parker Texas Bar No. 00707203 Jones & Davis LLP 15851 Dallas Parkway, Suite 1220 Dallas, Texas 75001 Telephone: (972) 733-3117 Telecopier: (972) 733-3119
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/s/ Vincent J. Allen

Vincent J. Allen